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IN THE

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1941

No. 27

In the Matter of [illegible]

Petition [illegible]

Order [illegible]

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IN THE

Supreme Court of the United States.

October Term, 1941.

No. .

In the Matter of HARRY M. ALBRIGHT, BANKRUPT,
ROBERT P. SHICK, *Petitioner,*

v.

WILLIAM A. GOODMAN, TRUSTEE OF HARRY M. ALBRIGHT, BANKRUPT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Robert P. Shick, prays that a writ of certiorari issue to review the final order of the United States Circuit Court of Appeals for the Third Circuit, entered on October 10, 1941, *on the same afternoon on which argument was heard* on petitioner's appeal from the final order of March 21, 1941, (by Kirkpatrick J.) in the United States District Court for the Eastern District of Pennsylvania, in the Bankruptcy Cause No. 8578.

This order in this Circuit Court of Appeals was:

"Before Maris, Jones and Goodrich, Circuit Judges.

Per curiam.

The order of the District Court is affirmed."

No opinion was filed in support of the order. A petition for a rehearing evoked but an order,—"Denied", on October 30, 1941,—again without any memorandum or opinion, stating that Court's reasons for such its summary orders.

A. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The proceedings in the District Court were on petitioner's petition, praying that,—

1st., Restraining orders, allowed by that court on March 14, 1927, be vacated;

2d., A fund in escrow, under an agreement between petitioner and Albright, the bankrupt, and the Norristown-Penn Trust Company as escrowee, of October 18, 1923, be awarded to petitioner;

3rd., the State Court (C. P. of Montgomery County, Pennsylvania) be properly advised as to the legal effect of the usurped and void findings and orders of the referee (of September 28, 1926), and be instructed and requested to reverse its findings and orders of August 9, 1935 and reinstate petitioner's judgment liens (to 159 and 160, September Term, 1923 there), to remain in full force and effect, as originally entered; and

4th., the trustee be directed to show cause why he should not be adjudged in contempt, for his deceit, misrepresentations, and misuse of ("playing fast and loose" with) the process of the Federal Court.

A rule was allowed on this petition, the trustee respondent filed his answer, and after argument, that District Court, filed an opinion and later entered its final order, denying each and all of these prayers. The appeal from this final order to the U. S. C. C. A. 3d. C. then followed.

The Factual Situation.

The basic facts may be shortly summarized:—

I. On September 14, 1923 petitioner was the holder for value of 3 judgments entered of record in Montgomery County, Pennsylvania—self-confessed on "judgment" notes executed by H. M. Albright and *under his seal*—

and liens against several parcels of land owned by him in that county:—

(1) For $3000.00 entered October 4, 1922, on his note of that date, in favor of petitioner as payee;

(2) For $3,600.00 on his note of December 14, 1922, in favor of Walter G. Roland as payee and by him assigned to petitioner on February 5, 1923 but judgment not entered thereon until September 14, 1923, in favor of petitioner as the use-plaintiff;

(3) For $39,300. on his note of July 9, 1923, in favor of Walter G. Roland as payee, shortly thereafter assigned by him to petitioner but judgment not entered thereon until September 14, 1923, in favor of petitioner as the use-plaintiff.

II. In October 1923, the judgment debtor desired to convey one parcel of his lands. To enable him to give a title clear and insurable, on October 18, 1923, an agreement was executed between petitioner and this debtor, and the Title Insurance Company, whereby releases of the judgment liens were delivered by petitioner to the title insurance company, upon the usual representation to it by debtor, that no bankruptcy proceedings were contemplated by him and the net proceeds of the sale were deposited with

that company in escrow, pending the settlement of debtor's "claim that the three judgments were not valid liens, amicably or by appropriate legal proceedings". This escrowed fund was $6,000. or more, and the judgments remained liens upon the other valuable real estate of debtor.

III. This basic situation was a common and very usual one in Pennsylvania, readily solved by that State's well known practice, of petitions and rules to open judgments and be let into a defense, where the questions involved are resolved as if in equity—on bill and answer, and depositions, if necessary.

IV. The debtor did not follow this course but compelled petitioner to bring the issue into court, by issuing attachments sur execution upon the three judgments, the service of which on November 7, 1923, drew the fund into the possession of the State court (Common Pleas of Montgomery County) and gave that court *complete* and *exclusive* jurisdiction over the fund (in lieu of real estate) and the judgment liens—as the *res*—and over the parties thereto,

prior

to the debtor's adjudication in voluntary bankruptcy on November 9, 1923.

V. From that time on, the debtor as the bankrupt and his trustee, pursued a course, with the purpose (openly avowed by trustee's counsel in an argument *coram* the State court) of defeating petitioner's "secured claims" upon the judgments—self-confessed upon notes under debtor's seal and to this day never questioned as to their authenticity or delivery to their respective payees—by the use of every means possible.

His "maneuvers" failed to defeat the $3,000.00 judgment, which was paid on December 24, 1924 on the order of the referee, directing the trustee to request the escrowee-garnishee to pay it upon a release by the trustee to it for the amount due on it. Thereafter the fund in escrow, of about $3,000.00 and the remaining parcels of land, remained as security for the 2nd and 3rd judgments. This property, however, has now been confiscated without due process of law so far as petitioner's rights are concerned, by the successive errors of fact and law in the bankruptcy court (referee and District Court) and the State Courts, induced by the void and illegal orders of the referee (Sept. 28, 1926), apparently affirmed on review by the District Court—that make this case a veritable tumulus of error, concealing the true basic situation and remedy suggested in paragraph III, *supra.*

These errors chronologically were:—

(a) the referee failed to give petitioner a day in court, to present evidence in support of the validity of these two judgments, as he several times ruled in the hearings before him, prolonged through almost three years;

(b) the referee's findings were based on evidence, inadmissible under Pennsylvania laws, and *res inter alios acta,* because educed from the legal plaintiff in the notes, subpœnaed under Sec. 21-a of the Bankruptcy Act, to testify as to the "acts, conduct and property of the bankrupt" only;

(c) the referee's proceeding in a summary way to pass upon petitioner's secured claims and right to the escrowed fund, violated Sec. 23 of the Bankruptcy Act;

(d) the trustee on October 8, 1926 practiced a deceit upon the State Court by suppressing the referee's orders of September 28, 1926 and thereby justified the State court's findings that it was the *proper forum* in which to attack these judgments, and orders that the trustee should file there his petitions to open the judgments etc., at the same time giving him *stay orders,* "freezing" all proceedings on the judgments or attachments;

(e) the trustee on March 14, 1927, was disingenuous to the U. S. District Court in not disclosing these orders of the State court, of Jan. 28, 1927 (final because not appealed), when the federal restraining orders were granted so improvidently by that federal court;

(f) the reviewing District Judge later affirmed these referee's orders of September 28, 1926 in decisions and orders, "squinting," *not square* and *precise,* as required by law;

(g) the trustee misused these apparently affirmed orders of the referee, in support of pleas of *res judicata,* in securing from the State court piecemealwise:—

1. a dissolution of the attachments on July 18, 1930;

2. a reversal of the judgments on January 17, 1936;

3. a refusal by the State court, of an award of the escrowed fund, in March 1940.

The net result of all these moves by the trustee is that the fund is now a *waif,* probably liable to an escheat, the judgment liens are reversed, the whole purpose of the escrow agreement or contract of October 18, 1923 frustrated, the fundamental rule of comity disregarded and all of petitioner's security for "secured claims" (so scheduled

by the bankrupt and the referee), confiscated without due process of law as guaranteed the petitioner under the 5th and 14th Amendments to the U. S. Constitution. These several results were obtained by the trustee, by the highly irregular "piecemeal procedure", in presenting in 1930 to 1936 to the State court the apparently affirmed orders of the referee (of September 28, 1926) as *res judicatæ* of his alleged defenses to the judgments—in complete disregard (a) of the final orders of January 28, 1927 in the State court, as to the proper forum and appropriate procedure, to attack the validity of the judgments, and (b) the pleas of laches, *res judicata* and estoppel and suggestion of a breach of the rule of comity, interposed by petitioner to the trustee's several petitions, to dissolve the attachments, to vacate the stay orders in the State court, to open and reverse the judgments and to award the fund to the trustee.

B. JURISDICTIONAL STATEMENT.

1. This decision raises the federal question of the pleading of federal decrees or orders (*not* directly or precisely affirmed), in a state court, and thereby persuading the state court, to disregard its own prior final findings and orders and to reverse judgments, self-confessed on notes under debtor's seal (never once questioned in any wise as to their execution and delivery to creditor)—a question reviewable under § 237 (b) of the Judicial Code, 28 U. S. C. Sec. 344 (b).

2. The lower circuit court of appeals has rendered a decision in conflict with prior decisions of this Court (U. S. S. C.), as well as those of the same and other circuits and of the Commonwealth of Pennsylvania, the *locus contractus* and the prior adjudicated and by the respondent conceded

proper forum, in which in appropriate proceedings to open judgments, etc., and procure an award of the fund in escrow under an agreement to substitute it for a parcel of land, which was subject to the liens of these judgments.

3. This decision has decided important questions of local law in conflict with applicable local decisions, relative to (a) instruments under seal and pleas of want of consideration therefor; (b) the value or weight to be given to oral testimony, as against oral testimony, supported by documentary evidence, in support of a petition to open self-confessed judgments entered upon notes under seal, etc.; (c) the use of a foreign record, contrary to the provisions of Art. IV, Sec. 1, of the U. S. Constitution.

4. This decision has wholly disregarded the rule of comity, basic and fundamental in our American jurisprudence, with its dual system of courts of concurrent jurisdiction.

5. This decision condones and perpetuates a miscarriage of justice, in the impairment and violation of contract rights, and the confiscation of property, without due process of law, contrary to the 5th Amendment to the U. S. Constitution,—accomplished (a) by piecemeal procedure and (b) a failure to show "the utmost good faith" and make "the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other", so as to eliminate "any competition or rivalry on the part of the two courts themselves in regard to assuming jurisdiction"—censured (as to a) and enjoined (as to b) by this court in its decisions.

6. This decision has in the above respects so far departed from the accepted and usual course of proceedings

and so far sanctions such a departure in the lower district court, as to call for an exercise of this court's power of supervision—to correct a result that has "no basis in morals, in reason or in law" for a conscious sanction of the palpable miscarriage of justice.

C. QUESTIONS PRESENTED.

1. Presently, the question is whether a federal court should or may refuse to vacate its restraining orders to "stay further proceedings to enforce attachments execution" *sur* judgments in a state court, but issued improvidently under the peculiar circumstances of this appeal in the court below, and now continued in a vain and oppressive way, inasmuch as the stated purpose of them has long since been fulfilled and become moot, by reason of the attachments having been dissolved by the state court on July 18, 1930.

2. Basically and fundamentally the questions may be concisely stated:—

a. May a referee in bankruptcy adjudge to be void "secured debts", in the form of judgments in a state court and liens upon lands of debtor there and upon a fund escrowed in lieu of one parcel thereof, in plain violation of the provisions of the Bankruptcy Act in Section 23 "Jurisdiction of United States and States Courts", the 5th and 14th Amendments to the U. S. Constitution (as to due process of law) and of an agreement between the judgment debtor and his creditor, *induced* by debtor's representation that no bankruptcy proceeding was involved or contemplated by him, that in consideration of creditor's release of the liens, the fund realized from the sale of a parcel of debtor's lands should be escrowed in a 3rd party's hands until the

validity of the judgment liens had been determined "amicably or by appropriate legal proceedings" under the law of the Commonwealth of Pennsylvania, the *lex loci contractus?*

b. May a bankruptcy court render "squinting" decisions, apparently affirming such orders of the referee, and then permit and condone the use by the trustee in bankruptcy of the debtor (*under the protection of improvidently issued restraining orders*) of such apparently affirmed orders, in support of pleas of *res judicata,* to secure from the state court,—

First, a dissolution of attachments execution, which had drawn the escrowed fund into the possession and control of the state court, *prior to debtor's adjudication in bankruptcy,* as conceded by the trustee;

Secondly, a vacation of the state court's prior stay orders—allowed on the petitions and rules of this trustee for leave to intervene as party defendant in the judgment liens against debtor's land, and

Finally, a reversal of record by the state court, of these judgments, in favor of the defendant, with the *confiscation* thereby of the security for petitioner as creditor's judgment liens—

All three such orders being contrary to local (Pennsylvania) law as well as to the state court's own final and conclusive findings and orders thereon, that it was the *proper forum* in which to test the validity of these judgments and directing the trustee to file there his proper petitions to open the judgments and be let into a defense thereto, in this respect also directly violating the "law of the case" as made

by this trustee on his own petitions to the state court,—*prior* to the allowance of the federal restraining orders and to the federal district court's orders apparently affirming the referee's orders?

c. May the federal bankruptcy court and its process be used by the debtor in an openly *avowed* purpose or intention to "hinder, delay and defraud" a secured creditor of his security, as above outlined in the next above paragraph 2b?

d. May a federal court of equity decline or should it fail, when satisfied that itself or other courts, have fallen into a mistake, to overrule its own error or errors, and to revise without reluctance the errors or mistakes of a state court, that may have been *induced* by the fiat, not reasoned, judgments or orders of it (the federal court)?

e. Should a trustee in bankruptcy be rebuked or penalized for such contemptuous disregard of the "law of the case", as made by him in the state court, and misuse or abuse federal bankruptcy court's process, to accomplish his avowed purpose of defeating claims of a creditor upon self-confessed judgments upon notes under debtor's seal and never once questioned by him as to the execution and delivery of such notes?

D. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. This case raises a federal question, of pleading federal orders or decrees as *res judicatæ* in a state court, whose jurisdiction had concededly vested *prior in tempore* and therefore *prior in jure* and on the faith thereof, persuading the state court to disregard its own prior final and conclu-

sive findings and orders, so ruling, and prescribing proper procedure in that state court,—reviewable under Sec. 237 (b) of the Judicial Code, 28 U. S. C., Sec. 344 (b).

2. The order of October 10, 1941, of the U. S. C. C. A. 3d C., sanctions *fiat law, not reasoned justice*, in its disregard of fundamental principles of law in American jurisprudence and the Constitutional rights of litigants, under Art. IV, Sec. 1 of the U. S. Constitution and the 5th and 14th Amendments thereto.

3. This order sanctions and perpetuates a most unseemly conflict of jurisdiction between a federal bankruptcy court and a state court and "competition or rivalry on the part of these courts in regard to assuming jurisdiction", in complete disregard (a) of state (Pennsylvania) law as to contracts, judgment liens and defenses thereto, and the "appropriate proceeding" under that state's law, as provided for in the escrow agreement substituting a fund for land subject to the liens of the judgments, and made by the parties involved under a representation by the debtor that no bankruptcy was involved or contemplated by him, *prior* to his adjudication in voluntary bankruptcy, (b) of the federal principle of law, relative to comity as well as (c) the general principles of procedure, relative to piecemeal presentation of a cause, pleas of *res judicata,* laches, estoppel, "law of the case" and the equitable rule that *equity seeks to determine in one proceeding all issues involved* and *thus finally to terminate the whole litigation.*

4. "Right reason and conscience" have not been followed but "formalism has tempted the intellect" of the district and circuit judges "by the lure of scientific accuracy" (Cardozo, "Nature of the Judicial Process" pp. 66, 137).

5. This order and its disposition of the questions involved, are not in harmony or consonance with "ancient landmarks" in American Jurisprudence, of the decisions of the U. S. C. C. A.s, of this and other circuits,—of this Court (U. S. S. C.) and of the local law and decisions of the Commonwealth of Pennsylvania's courts.

6. The writ should be allowed, to correct the successful attempt (up to this date) of a debtor, by the use of the bankruptcy court, to "hinder, delay and defraud" his creditor, holding "secured claims" against the debtor and his lands, within the jurisdiction of a state court, whose jurisdiction concededly had *first been vested and therefore was exclusive to the end of the final disposition* of the controversy as to the validity of judgment liens (self-confessed judgments upon debtor's notes under his seal and never once questioned as to their execution and delivery) in accordance with the local state law and thereby prevent a *confiscation in fact,* without due process of law, of cash and real estate of the value of upwards of $30,000, the creditor's security for his claims.

PRAYER.

Wherefore, it is respectfully, but earnestly urged, that the writ of certiorari should be granted, as prayed for, to review and correct the gross miscarriage of justice, brought about by the deceit, "playing fast and loose with the processes of law" and contemptuous disregard of final judgments obtained by him, on the part of the trustee and his counsel but also by a proper warning or admonishment, to rebuke such tactics in federal bankruptcy causes. A stern rebuke or warning in a review of this case and correction of the gross injustice to petitioner in substantial property

rights, would *serve a public purpose as well, in the correction of a growing evil in commercial transactions and litigation.*

ROBERT P. SHICK,
Petitioner.

Philadelphia, Pa., Jan. 7, 1942.

BRIEF IN SUPPORT OF THE PETITION.

Inasmuch as the U. S. C. C. A. 3d C. has not filed any memorandum or opinion in support of its orders, of October 10, 1941 (filed within two hours after the conclusion of the oral argument on the appeal), and of October 30, 1941, but has contented itself with a per curiam order only, affirming the order of the District Court, from which the appeal was taken, and a simple "Denied", to petitioner's petition for a rehearing, petitioner submits herewith copies of his "Brief for Appellant and Appendix" and "Petition for rehearing", and prays that they may be incorporated herein by this reference thereto.

Petitioner would, in particular, refer to pages 10 and 11 of that "Brief" for a graphic presentation of the basic and fundamental errors involved in the "unseemly conflict of jurisdiction" for the factual basis for this petition.

1. THE STATE COURT'S JURISDICTION WAS PRIOR IN TEMPORE AND THEREFORE PRIOR IN JURE, AND EXCLUSIVE, TO THE END OF THE CASE.

The Facts.

(a) The escrow agreement of October 18, 1923 was *induced* by debtor's representation that *no bankruptcy proceeding was contemplated* by him, as required of him by the escrowee, the company insuring the title to the land sold and conveyed on that date.

App. pp. 11a, 12a; R. 285/1937 pp. 6-8.*

* "App."—is to Appendix throughout.
285/1937 is to Transcript of Record to 285/1937 in U. S. S. C. throughout.

(b) The attachments *sur* execution, issued on the three judgments on November 6, 1923 and served by the Sheriff of the state court on November 7, 1923, drew the fund into the possession of that court and gave it, under the rule of comity, complete and exclusive jurisdiction over the *res* (fund and judgment liens) and the parties, as of that date,

prior

to the debtor's being adjudicated a voluntary bankrupt, on November 9, 1923.

App. p. 12a; R. 285/1937, pp. 100-101.

(c) It was solemnly and expressly conceded by the trustee in his answer filed in the state court on September 5, 1930.

R. 285/1937, pp. 257-8. app. 10a

(d) It was recognized by the referee in,—

(1) his instructions to the trustee, to get possession of the fund, on December 19, 1923

App. p. 13a; R. 285/1937 p. 30;

(2) his order on trustee to release the fund *pro tanto,* to pay the $3,000. judgment—on December 24, 1924.

App. p. 13a (7); R. 285/1937, pp. 14-17.

The Law.

Peck v. Jennes, 7 How. 612, 625;
Taylor v. Carryl, 24 Pa. 259, 20 How. 584, the famous "Royal Saxon" case;
Palmer v. Texas, 212 U. S. 118;
Taubel v. Fox, 264 U. S. 426, 432-6;
Harrison v. Chamberlin, 271 U. S. 191, 193.

2. THE RESTRAINING ORDERS WERE IMPROVIDENTLY GRANTED,

because—

(a) the trustee had equal, and more protection under the state court's *prior* "stay orders", allowed by it on January 28, 1927 and continued indefinitely, on February 11, 1927, on trustee's petition therefor.

App. pp. 13a-14a; R. 285/1937, pp. 132-169, 218, 224, 396, 401-2.

(b) they were *ultra vires,* under the rule of comity:—

Tenn. Marble Co. v. Grant, 135 F. 322 (Dallas, J. in U. S. C. C. A. 3d C.);

Dayton Coal & Iron Co., 291 F. 390 (Sanford, D. J. in 6th Circuit);

Martin v. Oliver, 260 F. 89, 93-96 (Sanborn, J. U. S. C. C. A. 8th C.);

Amn. Surety Co. v. Baldwin, 287 U. S. 156, Brandeis, J. (from U. S. C. C. A. 9th C.).

(c) they were induced by a non-disclosure of the exact facts in this litigation in the state court. Censured by Taft, C. J. in

Harkin v. Brundage, 276 U. S. 36, 55.

App. p. 14a (11), 38a-40a; R. 285/1937, pp. 130-138, 246 (22).

3. THE PURPOSE OF THE RESTRAINING ORDERS BECAME MOOT ON JULY 18, 1930, WHEN THE STATE COURT VACATED THE ATTACHMENTS SUR EXECUTION ON THE TRUSTEE'S OWN MOTIONS. THE ORDERS READ, "IT IS ORDERED THAT FURTHER PROCEEDINGS TO ENFORCE" THE ATTACHMENT EXECUTIONS ON THE JUDGMENTS "BE STAYED".

App. 39a (f); R. 285/1937, pp. 130, 192-3, 370-1.

Their continuance by the federal court after 1930, therefore, was and is vain and oppressive, under the peculiar circumstances of this case, with its unseemly conflict of jurisdiction, brought about by the lack of that "utmost good faith and fullest disclosure" of the "exact facts relevant to the litigation" in the proceedings in the federal and state courts—in the one cause—and improperly motivated, as the record abundantly shows.

App. pp. 4a-10a, 39a-40a (5).
Harkin v. Brundage, supra.
Vid. Argument in brief submitted in this case, to the U. S. C. C. A. 3d C., pp. 14-16.

4. THE REFEREE'S ORDERS OF SEPTEMBER 28, 1926 (ALMOST 3 YEARS AFTER DEBTOR'S BANKRUPTCY ADJUDICATION ON NOVEMBER 9, 1923) WERE ULTRA VIRES AND VOID,

because—

(a) Sec. 23 of the Bankruptcy Act was wholly disregarded in the referee's use of a *summary proceeding,* to pass upon the validity of judgment liens in the State court, with full knowledge on his part of the possession of the

fund by and complete jurisdiction over it and lands of debtor, vested first in the State court.

Taubel v. Fox, 264 U. S. 426, 429, 432-6;
Standard Gas & E. Co., Hastings v. Bylesby & Co. et al., 119 F. (2nd) 658, 661 (C. C. A. 3rd C.).

(b) The referee failed to give petitioner a "day in court" in defense of his judgment liens, as required by the 5th and 14th Amendments to the U. S. Constitution and his own rulings during the prolonged hearings before him.

R. 285/1937, pp. 79-87.

(c) The referee heard and considered testimony upon the plea of want of consideration for judgment notes under seal—not permissible in Pennsylvania law;

Killeen's Est., 310 Pa. 182, 187;
Commissioner of Int. Revenue, 113 F. (2nd) 352, 353, (C. C. A. 3rd C.).

(d) The referee in adjudging void two judgments (after directing payment of the 3rd by the escrowee) used testimony of a witness, subpœnaed under Sec. 21a of the Bankruptcy Act—as to the *"acts, conduct and property" only,* but *res inter alios acta* so far as petitioner's rights were concerned.

Jarvis, Trustee v. Bell, 296 Pa. 568, 574;
Re *Y. H. & T. Trade Co.,* 288 F. 507, 513.

(e) When measured or weighed by the standards of Pennsylvania law, all the testimony used by the referee was clearly insufficient to justify the opening of these judgments and declaring them void. As against the bankrupt's oath was arrayed that of the legal plaintiff in the judgment

notes, corroborated and supported by concededly genuine and credible documentary evidence and the notes under debtor's seal—"never enough to open a judgment on a note under seal".

Rice—P. J. in *Shannon v. Castner,* 21 Pa. S. C. 294, 320;

Warren Sav. B. & L. v. Foley, 294 Pa. 176, 184, 185.

(f) The lower district court did not in any direct, clear and precise way affirm these orders of the referee. "Squinting" opinions only, apparently affirmed them and the final orders of January 31, 1928 (Dickinson J. Appendix p. 35a) were most anomalous and irregular, in no wise in any proper sense judicial, reasoned ones but judicial fiat.

App. pp. 3a, 4a.

(g) These judgments were Pennsylvania liens upon real estate and by the escrow agreement subjected by the parties to that State's law to "settle defendant's (debtor's) objections" to their validity—*prior* to debtor's recourse to the federal bankruptcy court. The bankruptcy court's duty was to follow that State's local law.

Klaxon Co. v. Stenton Mfg. Co. (June 2, 1941), *U. S. S. C.* Adv. Op. 969, 971, approving *Erie R. R. Co. v. Tomkins,* 304 U. S. 64.

The *forum* and "appropriate proceeding" had also been made *res judicatæ* by the State court, in its findings and orders of January 28, 1927, a year prior to the orders of January 31, 1928 (Dickinson, J.) so irregular and ununderstandable as the last federal district judge (Kirkpatrick) concedes.

App. p. 35a.

5. THE COURSE PURSUED BY THE TRUSTEE, WITH THE PURPOSE OPENLY AVOWED BY HIS COUNSEL, WAS A CONTEMPTUOUS DISREGARD OF REGULAR AND ORDERLY PROCEDURE IN BOTH THE FEDERAL AND STATE JURISDICTIONS, WORKING A CONFISCATION OF VALUABLE PROPERTY OF PETITIONER WITHOUT DUE PROCESS OF LAW.

(a) The purpose and motivation of the trustee and his counsel are best shown in the Exhibits—Appendix pp. 4a-10a.

(a) The use of the referee's orders as competent and controlling—under a plea of *res judicata,* in petitions and other pleadings of the bankrupt's trustee in the State court, on February 11, 1927, March 28, 1930, September 5, 1930 and in the hearing there in 1935, upon his petitions to open the judgments, all tended to obfuscate the facts and issues involved and finally led the State court to completely frustrate and defeat the purpose of the escrow agreement between petitioner and the debtor of October 18, 1923 (prior to the bankruptcy adjudication on November 9, 1923), violate its own prior orders, fixing the *forum* to be in it and directing the trustee to follow the usual and customary procedure there for an attack upon judgment liens, and leave the fund a waif, ultimately liable perhaps to an escheat, and just judgment liens against valuable real estate still unliquidated in the hands of the trustee, reversed, *a confiscation in effect of upwards of $30,000* (cash $3,000. and $25,000 and more, in valuable factory sites at Oaks, Pennsylvania, at the confluence of Perkiomen Creek and the Schuylkill River)—all most wrongly and unjustly done to petitioner's great loss in that amount and contrary to peti-

tioner's rights, constitutional under Art. IV, Sec. 1 of the U. S. Constitution and the 5th and 14th Amendments thereto and legal, to regular and orderly procedure—not *piecemeal* presentation of a cause—and to proper use of the pleas of *res judicata,* want of consideration, laches and estoppel, under Pennsylvania's local law, as well as federal law,—

Siegfried v. Boyd, 237 Pa. 55, 59;
Pennoyer v. Neff, 95 U. S. 714, 729;
Amn. Surety Co. v. Baldwin, 287 U. S. 156, 166-169;
Thompson v. Fitzgerald, 329 Pa. 497, 505-510 affirmed in 305 U. S. 456, 466-8.

6. THE REVIEWING AND APPELLATE COURTS BELOW WOULD SEEM TO HAVE FORGOTTEN OR DISREGARDED (A) THE FUNDAMENTAL MAXIM IN EQUITY:—"EQUITY DELIGHTS TO DO JUSTICE AND NOT BY HALVES" AND (B) THE TRUE FUNCTION OF SUCH COURTS,—

1. As to the record,—

"While a court may and when justice requires it, should suggest amendments of the record, it had no right where, as here, the parties are *sui juris* and not wards of the court, to itself make such amendment, without a request of some of the parties interested and even then without giving the opposite party a hearing. *Litigation belongs to the parties and not to the court;* the latter may sustain or dismiss it, under the pleadings filed and proofs submitted by them, but beyond this he cannot properly go, without an application or consent, so long as the parties are legally competent to act for themselves."

Tasin v. Bastries, 284 Pa. 47, 54, Simpson, J.;
Mintz v. Mintz, 83 Pa. S. C. 85, 88, 89.

2. As to the function of judges:—

"We sit here and apply rules of law and procedure. But we sit here, not as umpires, while counsel play the game of litigation but because those rules of law and procedure in most cases assist us to do justice. Occasionally a strict reliance on them may do otherwise. In such a case the Court should be *astute* to see and *be quite certain* that they are bound to an unfortunate result by a technical rule such as that of *res judicata.*"

Workington H. & D. Board v. Trade Indemnity Co., 3 All Eng. R. 139.

"The erroneous construction of the law affords no basis in morals, in reason, or in law, for a conscious repetition of the same error."

Reamer's Estate, 331 Pa. 117, Stern, J.

7. THE EXERCISE OF THIS COURT'S APPELLATE JURISDICTION IS REQUIRED, NOT ONLY TO CORRECT ERRORS IN THE ORDER PRESENTLY UNDER REVIEW BUT TO MAKE SUCH A DISPOSITION OF THE CASE AS JUSTICE AND RIGHT MAY REQUIRE.

Honeyman v. Hanan, 300 U. S. 14, 25, 26;
Va.-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 260;
Forsyth v. Hammon, 166 U. S. 506, 515, 520;
Palmer v. Texas, 212 U. S. 118, 129, 132.
Phoenix Finance Corp. v. In-Wisconsin Bridge Co., Op. Nov. 17, 1941 (19 Oct. Term 1941);

CONCLUSION.

Wherefore, it is respectfully submitted but earnestly urged that a writ of certiorari should issue from your Honorable Court, to examine and review this case in the U. S. C. C. A. 3d C., and "without reluctance" also to revise (*Rogers J. Johnson v. Cadillac Motor Co.*, 261 F. 878, 884-5), the errors in the lower federal and in the state courts (of Pennsylvania) that were induced by them, and thereby correct the gross miscarriage of justice, and the oppressive and unjust confiscation of property without due process of law—in "accord with the teachings of right reason and conscience" (Cardozo, "Nature of the Judicial Process" p. 137.)

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(Germantown), Philadelphia, Pa.
Counsel.

January 7, 1942.

(29)

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CLERK

IN THE

Supreme Court of the United States

October Term, 1941

No. 853

IN THE MATTER OF HARRY M. ALBRIGHT, BANKRUPT

ROBERT P. SHICK, Petitioner

v.

WILLIAM A. GOODMAN, Trustee of HARRY M. ALBRIGHT, Bankrupt, Respondent

BRIEF ON BEHALF OF WILLIAM A. GOODMAN, TRUSTEE, RESPONDENT, IN ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHARLES H. WEIDNER,
and with him
JOHN H. BERTOLET, both of
STEVENS & LEE,
Attorneys for William A. Goodman, Trustee.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.

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II. PRIOR OPINIONS IN COURTS BELOW

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Roland, (To Use) v. Albright, 302 U. S. 776; 58 S. Ct. 136; 82 L. Ed. 601.

Shick v. Goodman, Trustee, 333 Pa. 369; 5 A. (2d) 363.

III. STATEMENT OF THE CASE

This is a petition by Robert P. Shick, appellant, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit (hereinafter called the "Circuit Court") to bring up for review the order of that Court, entered October 10, 1941, (R. 58, 59) affirming the order of the District Court of the United States for the Eastern District of Pennsylvania (hereinafter called the "District Court"), entered March 21, 1941, (R. 41a, 42a) denying the prayers of the petition of said Robert P. Shick filed July 17, 1940, in the matter of Harry M. Albright, Bankrupt, which prayers were as follows (R. 16a, 17a):

> "First, the restraining orders, allowed by this court on March 14th, 1927, be vacated;
>
> "Second, the fund in escrow still in the possession of the Norristown-Penn Trust Company, of Norristown, Pennsylvania, and title to which has not yet been adjudicated, be now awarded to your petitioner;
>
> "Third, the State Court be properly advised by this Court, as to the legal effect of the usurped findings and orders of the Referee (of September 28, 1926), and that State Court be instructed to reverse its findings and orders of August 9, 1935, and to allow petitioner's judgments to Nos. 159 and 160, September Term, 1923, in that Court, to remain in full force and effect as originally entered; and
>
> "Fourth, the trustee, William A. Goodman, be directed to show cause why he should not be adjudged in contempt of this Court, for his deceit, misrepresentation, and misuse of ('playing fast and loose' with) the process of this Court."

Statement of the Case

On September 14, 1923, Robert P. Shick held by assignment two judgment notes executed by the bankrupt to Walter G. Roland, the one dated December 14, 1922, and being in the amount of $3600., and the other dated July 9, 1923, and being in the amount of $39,300. On that day judgments were entered upon these two notes in the Court of Common Pleas of Montgomery County, Pennsylvania (hereinafter called the "Common Pleas Court"), to No. 70 and No. 71 September Term 1923 respectively, and the judgments were marked to the use of Shick (R. 18a, 19a). Shick was also the holder of a third note and judgment for $3000., but this note and judgment are not material to the present case. So that the bankrupt might convey a title to certain real estate in Montgomery County, Pennsylvania, clear of the lien of these judgments, Shick and Albright entered into an escrow agreement on October 18, 1923, with Norristown Trust Company, now Norristown-Penn Trust Company, under which certain of the proceeds of the sale of the land were deposited with the Trust Company to be held by it "until the claim of said Albright that the lien and the validity of the said judgments is in doubt has been settled, either amicably or by appropriate legal proceedings", and on the same day the land in question was released of record from the liens of the two judgments (R. 19a, 20a). On November 6, 1923, Shick instituted attachment execution proceedings in the Common Pleas Court on each of the judgments to No. 159 and No. 160 September Term, 1923, respectively, naming the Trust Company as garnishee. The Trust Company was served with the writ on November 7, 1923 (R. 12a, 20a).

On November 9, 1923, Albright filed with the District Court his petition to be adjudged a voluntary bankrupt and on the same day was duly adjudged a bankrupt (R. 12a). The case was referred to the Referee in Bankruptcy at Reading, Pennsylvania, and in due course William A.

Goodman, the appellee, was elected trustee and qualified as such (R. 12a).

On December 5, 1923, Shick filed a separate proof of claim on each of the judgment notes with the Referee and listed the judgments as security.* The trustee filed objections to both claims (R. 21a). Thereupon the Referee held a series of hearings participated in by Shick, culminating almost three years later in the Findings of Fact and Order filed by him on September 28, 1926, in which he found "that the notes for $39,300.00 and $3,600.00 are fraudulent and void, and the claims based thereon are invalid" and ordered as follows (R. 54):

> "The claim of Robert P. Shick, assignee of Walter G. Roland, upon note of $39,300.00 dated July 9, 1923, entered of record in Montgomery County, Pa., September 14, 1923, to No. 71, September Term, 1923, J. D. is disallowed and expunged.
>
> "The claim of Robert P. Shick, assignee of Walter G. Roland upon judgment note of $3,600.00, dated December 14, 1922, entered of record in Montgomery County, Pa.; to No. 70, September Term, 1923, J. D. is disallowed and expunged."

Shick thereupon instituted proceedings in the District Court for a review of the Referee's action and the next sixteen months were spent in disposing of this review. Finally, on January 31, 1928, after arguments and reargu-

---

*In Paragraph 6 of the trustee's answer to Shick's petition (R. 21a) it was averred that in Shick's proofs of claim on the judgment notes in question, credit was given for the value of the security held, namely, the judgments. No such credit was in fact given and the claims did no more than list the judgments as security for the claims (see Transcript of Record in Appeal to U. S. C. C. A. 3rd to No. 3822 October Term, 1927, pp. 17, 18, 23). This error was caused by the fact that present counsel for the trustee entered the case only after the filing of Shick's petition and did not have an opportunity, prior to the time for filing the answer, to examine and compare in detail the voluminous records and documents which had accumulated during almost seventeen years of prior litigation.

ments resulting in the writing of five opinions by Dickinson, J., a final order was made, the effect of which was to confirm the order of the Referee (Opinion of Kirkpatrick, J., R. 35a, 36a; also R. 27a, 28a, 29a).

Meanwhile, however, Shick had not been idle in the Common Pleas Court. After allowing the attachment execution in that court to lie dormant for a year and two months while he pressed his claims before the Referee, Shick, on January 11, 1926, filed his interrogatories and obtained a rule upon the garnishee, the Trust Company, to answer. The Trust Company answered and Shick secured a rule upon it to show cause why judgment should not be entered against it for an amount admitted due. Thereupon, on July 28, 1926, the trustee petitioned the Common Pleas Court for leave to intervene as a defendant in the two judgments and for a stay of proceedings on the attachments (R. 27a). The trustee's petition set forth that there was a proceeding affecting the judgments in question before the District Court (R. 13a). On January 28, 1927, an order was entered permitting the trustee to intervene as a defendant and staying the attachment proceedings unconditionally for fifteen days and indefinitely upon condition that the trustee file a petition to open the judgments within fifteen days (R. 13a, 23a). On the trustee's petition, filed February 11, 1927, and his representation of the pendency of the proceedings on Shick's claims in the District Court, the time condition relating to the filing of a petition to open the judgments was extended to March 14, 1927.

The trustee was thereupon confronted with the apparent necessity of instituting an entirely new line of proceedings to contest the validity of Shick's claims while the proceedings in the District Court were still pending. If he did not, Shick would be free to press the attachment execution and take possession of the fund while the District Court was still considering the rights of the parties to it.

The trustee thereupon, on March 14, 1927, petitioned the District Court for orders restraining Shick from proceeding under the attachment executions, and the court, on the same day, entered orders staying further proceedings to enforce the attachment executions (R. 23a, 24a). Shick filed motions to vacate the restraining orders on March 21, 1927, which motions were overruled by the court on April 8, 1927. The opinion of the court on these motions is reported in:

In Re: Albright, 18 F (2d) 591.

On April 20, 1927, Shick petitioned for a rehearing on his motions to vacate the stay orders, and on the same day reargument was refused (R. 25a, 27a, 28a).

Therefore, as a result of these various proceedings, in February, 1928, the situation was as follows: Shick had presented his claims on the two judgment notes in the bankruptcy court and these claims had been disallowed by the Referee and the Referee's action had been confirmed by the District Court. The trustee had been allowed to intervene as a defendant in the judgments entered in the Common Pleas Court but had not as yet filed any petition to open the judgments. There was no stay order of the Common Pleas Court with respect to the attachment executions issued on the judgments, but proceedings by Shick on the attachment executions were prohibited by the restraining orders of the District Court.

Matters did not long remain in this condition, however. On March 1, 1928, Shick filed in the District Court notice of his appeal to the Circuit Court of Appeals for the Third Circuit from the District Court's orders of January 31, 1928, confirming the Referee's disallowance of his claims. This appeal was docketed as No. 3822 October Term, 1927. On March 19, 1929, the Circuit Court affirmed

the order of the District Court (R. 3a).* The opinion on this appeal is reported in:

Shick v. Goodman, 33 F (2d) 291.

Shick applied for a reargument but reargument was denied on May 13, 1929. Shick thereupon petitioned the Supreme Court of the United States for a Writ of Certiorari, but his petition was denied on October 14, 1929.

Shick v. Goodman, Trustee, 280 U. S. 561, 50 S. Ct. 19, 74 L. Ed. 616,

and reargument thereon was also subsequently denied (R. 28a).

Except for two more petitions to vacate the restraining orders of March 14, 1927, and one petition to vacate the order of January 31, 1928, all of which were denied, nothing further occurred in the District Court with reference to the claims of Shick until July 17, 1940, when he filed the petition which has given rise to the present appeal.

This lull, however, must under no circumstances be taken to indicate any inactivity on the part of either Shick or the trustee. It merely means that the scene shifted from the District Court to the Common Pleas Court. After protracted preliminary skirmishes, begun on March 28, 1930, relating to the orders of the Common Pleas Court, entered January 28, 1927, and March 4, 1927, the trustee filed with that Court on September 30, 1932, his petitions to have Shick's two judgments opened, to let the trustee into a defense and to have the judgments declared null and void,

*In Paragraph 20 of the trustee's answer to Shick's petition to vacate restraining orders, etc. (R. 29a) it is alleged that Shick took no appeal from the District Court's orders of January 31, 1928, and Judge Kirkpatrick, in his opinion (R. 35a, 36a), evidently followed this allegation. In Paragraph 19 (R. 27a, 28a) of said answer it is alleged that an appeal was taken by Shick from the District Court's orders of April 8, 1927, refusing to vacate the restraining orders of March 14, 1927. The allegation in Paragraph 19 is erroneous and was caused by the then unfamiliarity of the trustee's present counsel with the case and his reliance upon the somewhat misleading impression as to the nature of the appeal gained from the opinion filed therein.

and on August 9, 1935, the Common Pleas Court found verdicts for the trustee as to both judgments (R. 30a). Judgments were entered in favor of the trustee on January 17, 1936. Shick thereupon took an appeal to the Supreme Court of Pennsylvania, which, in a Per Curiam opinion, handed down on March 22, 1937, affirmed the judgments in favor of the trustee on the conclusions of the lower court (R. 30a),

> *Roland, (To Use) v. Albright, et al.*, 325 Pa. 431, 190 A. 885.

Again Shick petitioned the Supreme Court of the United States for a Writ of Certiorari and again his petition was denied on October 11, 1937,

> *Roland, (To Use) v. Albright*, 302 U. S. 688; 58 S. Ct. 40; 82 L. Ed. 532,

and rehearing denied on November 8, 1937,

> *Roland, (To Use) v. Albright*, 302 U. S. 776; 58 S. Ct. 136; 82 L. Ed. 601.

Shick required just a little less than three months to conceive his next step, which was the filing in the Common Pleas Court on January 17, 1938, of a petition for a declaratory judgment, attempting to raise anew his claim upon the two judgment notes and the judgments entered thereon and to assert anew a claim to the fund still held in escrow by the Norristown-Penn Trust Company. The Common Pleas Court dismissed the petition on May 13, 1938, whereupon Shick again led the trustee up the now quite familiar appellate trail to the Supreme Court of Pennsylvania, which court, in the also now quite familiar fashion, affirmed the lower court on March 22, 1939 (R. 30a).

> *Shick v. Goodman, Trustee et al.*, 333 Pa. 369, 5 A (2d) 363.

Reargument was denied by the Pennsylvania Supreme Court on April 13, 1939.

After April 19, 1939, the trustee made various efforts to secure the escrowed fund, none of which met with any success, largely because of the reluctance of the Trust Company to give up voluntarily the fund which Shick had been so persistently pursuing for so many years (R. 31a).

The petition giving rise to the present appeal (R. 11a-17a) was filed with the District Court on July 17, 1940, and was disposed of by the court upon the pleadings incident thereto and the prior record in an opinion filed by Kirkpatrick, J., (R. 33a-37a) on November 6, 1940, in which he stated, at the end of the second to last paragraph thereof (R. 37a), "The prayers of the petition are denied". The trustee considered this a final disposition of the matter and therefore took no further steps. Shick, however, asked for a rehearing and was refused it on November 18, 1940. Thereafter, on March 21, 1941, at the instance of Shick, the District Court entered its so-called Final Order (R. 41a).

Shick thereupon took his appeal from this order of the District Court of March 21, 1941, to the Circuit Court, which was docketed in the Circuit Court as No. 7775 October Term, 1941. In his brief before the Circuit Court Shick set forth the questions involved as follows:

> "1. May a debtor defeat just debts of his, secured by three self-confessed judgments upon his notes under seal (never questioned as to authenticity and delivery) and liens upon his valuable real estate in the State court's jurisdiction—after he had procured, by a representation that no bankruptcy was contemplated, releases of the judgments by the creditor upon condition that the proceeds of a sale of one piece of such real estate be escrowed pending settlement of his objections to the judgments 'amicably or by appropriate legal proceeding,' and the escrowed fund was drawn into the State court's possession by attachments execution—by the use and misuse of the Federal bankruptcy court and its process in an utter disregard of

(a) the rule of comity, and (b) the provisions of Section 23 of the Bankruptcy Act, and under the shield of its restraining orders by the use of void orders of the referee piecemeal wise, secure in the State court, first, a dissolution of the attachments, thereby ousting the fund from the State court's possession, and second, a reversal of the judgment liens, this last directly contra to the State court's prior findings on petition of trustee for debtor and order on trustee to present to it as the proper forum in which to attack the judgments in the 'appropriate proceeding' of petitions to open them?

"2. Should a Federal court 'permit itself to be used for the purpose of perpetrating such a fraud or attaining such an inequitable result' and now refuse to correct the fraud and injustice in a proper way?"

The trustee in his brief set forth a counter-statement of the questions involved, restating the questions in this way:

"1. Where debtor and judgment creditor agree that proceeds of sale of realty subject to judgments entered in State Court, be deposited in escrow pending determination, amicably or by appropriate legal proceedings, of debtor's contention that judgments were invalid, are rights of creditor and debtor's bankruptcy trustee to fund, as well as question of validity of judgments, res judicata where creditor, despite his prior commencement in State Court of attachment executions against fund, presented claims before Bankruptcy Court which were disallowed after contest participated in by him, where State Court subsequently allowed trustee to intervene as a defendant and opened and set aside the judgments, and where State Court also dismissed creditor's petition for declaratory judgment establishing his right to fund?

"2. After above action by Bankruptcy and State Courts, should Bankruptcy Court vacate orders issued

during pendency of claim proceedings in Bankruptcy Court restraining creditor from proceeding with attachment executions in State Court?

"3. Was trustee guilty of contempt of Bankruptcy Court in going into State Court to maintain there the status quo pending determination of claim proceedings in Bankruptcy Court and in going into State Court after determination thereof to have judgments reversed in conformity with disallowance of claims by Bankruptcy Court?"

The Circuit Court affirmed the order of the District Court on October 10, 1941 (R. 58, 59) by a Per Curiam decision without any opinion. Shick petitioned the Circuit Court for reargument (R. 61-64), but reargument was denied on October 30, 1941 (R. 65).

It is the action of the Circuit Court in affirming the order of the District Court of March 21, 1941, that Shick complains of and for the review of which he has filed the present petition for a Writ of Certiorari.

IV. ARGUMENT

A. Introduction

Although the purpose of these proceedings at the present time is to determine whether or not this Court should review the decision of the Circuit Court, rather than to determine the case upon its merits, counsel for the trustee believe that some discussion of the merits of the case as presented to the Circuit Court will be of assistance in determining the primary question. Reference will therefore be made to certain phases of the case as presented on behalf of the trustee to the Circuit Court, and additional matter will be added from time to time with special reference to the primary question to show that the case is not one warranting the issue of a Writ of Certiorari. Following this general discussion, special and specific references will be made to the petitioner's petition and brief to the extent that this may seem necessary to supplement the general discussion.

Perhaps the best comment that can be made upon the whole case is a simple reference to the opinion of Judge Kirkpatrick, filed in the District Court November 6, 1940 (R. 33a-37a), on Shick's petition to that Court, in which Judge Kirkpatrick first recited in detail the facts of the case and, having done so, found just five full lines of printed matter (R. 37a) quite adequate to dispose of the whole case, saying:

> "It seems to me that in view of the recital of the proceedings just made, any discussion would be quite superfluous. Mr. Shick has had every issue upon which his petition is grounded adjudicated and readjudicated

by the various courts to which he appealed. The prayers of the petition are denied."

Of like significance was the action of the Circuit Court, which disposed of the matter without any opinion whatsoever (R. 58). Shick interprets such treatment of his petition as the making of fiat law, amounting to a "disregard of fundamental principles of law in American jurisprudence and the constitutional rights of litigants under Art. IV, Sec. 1 of the U. S. Constitution and the 5th and 14th Amendments thereto". The trustee suggests that it is the natural and proper result of a course of repetitious litigation, dragging over a period of more than eighteen years.

B. The Invalidity of Shick's Judgments and His Lack of any Claim to the Escrowed Fund Are Res Judicata and no Questions Relating Thereto Are Subject to Review at this Time or Should Be Reviewed

---

This phase of the argument deals with the first question set forth in the trustee's Counter-Statement of Questions Involved, as presented before the Circuit Court, and with the second and third parts of the prayer of Shick's petition to the District Court, namely, that the escrowed fund be awarded to him, and that the State Court be requested to reinstate his two judgments.

Shick presented claims before the bankruptcy referee on the two notes on which judgments had been entered, setting forth the judgments as security. He did not claim upon the judgments as is repeatedly implied in his petition and brief. The trustee contested these claims. Shick took part in the contest in his own behalf. If there were any doubt about this, Shick's own words before the Referee conclusively determine the question against him, for he

himself stated before the Referee (Appellee's Narrative of Testimony in appeal to U. S. C. C. A. 3rd, No. 3822 October Term, 1927, page 31):

> "Mr. Shick: I am here in my own person as a claimant and not merely representing the witness, and I insist on an objection when he is going back to the very things that were ruled upon, and I submit that there is an end to the attempts to get a thing that has once been ruled upon."

Incidentally, if Shick were to practice what he preached in the latter part of this quotation when he found that rule to his advantage, this case would not be here now. Shick secured a review of the Referee's order by the District Court.

The final orders of the District Court, entered January 31, 1928, on the petition for review, coupled with Shick's elections, filed February 20, 1928, not to comply with the alternative granted him in these final orders (R. 56, 57), amounted to a confirmation of the Referee's order. Shick took an appeal from this action of the District Court to the Circuit Court and the Circuit Court affirmed the action of the District Court. A study of the opinion of the Circuit Court in that appeal

Shick v. Goodman, 33 F (2d) 291,

clearly indicates that the major, if not the only, question there considered was the very one now raised, namely, whether the Bankruptcy Court had proper jurisdiction of Shick's claims. Whatever else that appeal decided, it unquestionably decided that the Bankruptcy Court was a proper forum in which to contest the validity of Shick's claims by virtue of the notes. This Court refused to review this decision of the Circuit Court,

Shick v. Goodman, Trustee, 280 U. S. 561; 50 S. Ct. 19; 74 L. Ed. 616.

All other questions concerning the procedure before the Referee, the admissibility and weight of evidence and the effect of the District Court's opinion of January 31, 1928, could have been reviewed in that appeal; if they were not, Shick cannot now be allowed to substitute this proceeding for an appeal with respect to those questions.

By virtue of this line of proceedings, Shick is now confronted with an order of the Bankruptcy Court disallowing his claims, in the making of which order both he and the trustee were parties, in the course of which both the merits of the case and the question of jurisdiction were decided against him, and which directly invalidates the claims upon which he bases his right to the escrowed fund and on which his two judgments were entered. This Court, as just stated, has already refused to review the determination of these questions by the Federal Courts.

Having secured a disallowance of Shick's claims in the Bankruptcy Court, the trustee went into the State Court to have Shick's judgments set aside and removed from the record in accordance with the findings of the Bankruptcy Court. Shick was a most active party in opposition to this proceeding and had ample opportunity to raise in the State Court all the questions which he now raises here with respect to the jurisdiction of the respective courts and the use of the Federal record in the State Courts. The Common Pleas Court, despite Shick's opposition, received the Federal record and decided that the action of the Bankruptcy Court made the question of Shick's claims upon which the judgments were founded res judicata, but in addition, made specific findings of its own that the claims were invalid and set aside the judgments. The Common Pleas Court was affirmed by the Supreme Court of Pennsylvania,

Roland, (To Use) v. Albright, 325 Pa. 431, 190 A. 885.

The opinion in the last cited case is as follows (p. 432):

> "This is an application to open judgments. After much legal maneuvering in State and Federal courts, the parties finally agreed to submit their controversy to Judge Corson for trial by him without a jury. He concluded as follows: '1. That the District Court for the Eastern District of Pennsylvania was a Court of competent jurisdiction and had jurisdiction to pass upon the validity of the claims of Robert P. Shick, represented by the present judgments, against the bankrupt estate of Harry M. Albright; 2. That the findings of such Court upon such claims are binding upon this Court in the present proceedings; 3. That the two notes here in question were given without any consideration passing either from Roland to Albright or from Shick to Roland; 4. That the notes in question were fraudulently entered; 5. That the United States District Court for the Eastern District of Pennsylvania found that the present use-plaintiff, Robert P. Shick, had no claim whatever against Harry M. Albright upon such notes; 6. That such finding makes the question of the claims of Robert P. Shick in the present proceeding res adjudicata and binding upon this Court in the present proceedings.' On these conclusions the court entered judgments for defendants.
>
> "The judgments are affirmed on the conclusions quoted."

This Court also refused to review this action of the Supreme Court of Pennsylvania,

> *Roland (To Use) v. Albright, et al.*, 302 U. S. 688; 58 S. Ct. 40; 82 L. Ed. 532.

and subsequently refused to hear reargument on the application for review

> *Roland (To Use) v. Albright, et al.*, 302 U. S. 776; 58 S. Ct. 136; 82 L. Ed. 601.

By this time, therefore, in addition to the decision of the District Court affirming the Referee's disallowance of the claims and the decision of the Circuit Court, which at the very least affirmed the jurisdiction of the Bankruptcy Court to pass upon the claims and the refusal of this Court to review this action of the Federal Courts, Shick was also faced with the decision of the highest State Court that the Bankruptcy Court was competent and had jurisdiction to pass upon the claims and that the claims were invalid and also with a refusal by this Court to review the action of the State Court. It should be remembered that the Common Pleas Court, which set aside these judgments on the record of the Bankruptcy Court, was the same Court which Shick now argues had previously determined that it, itself, was the only proper forum in which to test his claims.

If these two main streams of procedure in the Bankruptcy Court and the State Court were not enough to close the door upon Shick, there remain two supplemental lines of action to be considered. The first took place in the Bankruptcy Court when Shick attempted to have the District Court vacate its orders entered March 14, 1927, restraining him from proceeding in the State Court with his attachment executions resulting in a decree of the District Court refusing to vacate the orders,

In Re: Albright, 18 F (2d) 591.

In arriving at this result, the District Court dealt again almost exclusively with the question of its jurisdiction over the claims. It decided in favor of its own jurisdiction and against Shick's contention. Shick took no appeal.

The second of these supplemental proceedings was a petition for a declaratory judgment, filed by Shick in the same Court of Common Pleas which had heard all the previous matters before the State Court and which Shick contends had exclusive jurisdiction of the case. This Court,

however, dismissed the petition and was upheld in so doing by the Supreme Court of Pennsylvania,

> *Shick, Appellant v. Goodman, Trustee, et al.*, 333 Pa. 369, 5 A (2d) 363.

Again the Per Curiam opinion of that Court is worth quoting:

> "Passing the question whether the present proceeding for a declaratory judgment was a proper one under the Declaratory Judgment Act, we affirm the order of the court below, on the following extract from its opinion: 'The issues framed [referring to the issues in the proceeding in the Court of Common Pleas to open the judgments] were tried before the writer of this opinion, as a court sitting without a jury. This court found that the judgments [in question] were fraudulent and void and so declared. On the 17th day of January, 1936, exceptions to this finding were dismissed by this court and an appeal was taken to the Supreme Court. The Supreme Court, as of Nos. 18 and 19, January Term, 1937, handed down an opinion sustaining the findings of this court and the conclusions of law and affirming the verdict, as found by this court. [Roland (to use of Shick) v. Albright, 325 Pa. 431, 190 A. 885.] Upon this state of facts the question of the validity of these judgments is finally res adjudicata and it would make a mockery of the law to allow the present plaintiff, through the Declaratory Judgment Act, to attempt indirectly to raise the question of the validity of these judgments when such question has already been passed upon by the District Court, the Federal Court of Appeals, this court, the Supreme Court of Pennsylvania, and further appeal refused by the Supreme Court of the United States.'
>
> "Order affirmed at appellant's cost."

Argument

Reference will now be made to just a few cases decided by the Circuit Court of Appeals for the Third Circuit, and cited in the trustee's brief before that Court, on the subject of res judicata.

The doctrine of "res judicata" means simply that a cause of action, once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot be litigated by a new proceeding either before the same or any other tribunal,

Bluefields S. S. Co., Ltd. v. United Fruit Co., 243 F. I.

Where the subsequent suit between the same parties is based on the same cause of action, the prior judgment concludes all matters which might have been litigated in the prior action; the "cause of action" is the ground on which the action may be sustained and comprises every fact which plaintiff must prove to obtain judgment or which the defendant may traverse,

Graff Furnace Co. v. Scranton Coal Co., 266 F 798.

A more recent consideration of the doctrine of res judicata in several of its phases is found in

Evans v. Ely, 30 F (2d) 912,

where the Court states at page 913, quoting from

Cromwell v. County of Sac, 94 U. S. 351, 353, 354; 24 L. Ed. 195,

and from

Southern Pacific Railroad Co. v. United States, 168 U. S. 1, 48; 18 S. Ct. 18, 27; 42 L. Ed. 355

"* * * * It should be borne in mind, * * * that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as

an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * *

" 'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'

" 'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified'."

That the doctrine of res judicata is applicable even though the former decision may not have been rendered by the same court as that before which the action is pending in which the plea of res judicata is made, is established by

Talbot, et al. v. Quaker State Oil Refining Co.,
104 F (2d) 967,

where a judgment of the Supreme Court of Pennsylvania that one of the joint owners of a patent had licensed a

certain company thereunder was held to be res judicata of such issue when presented as a defense in a suit in the Federal Court by both joint owners for infringement of the patent. Indeed in that case the doctrine of res judicata was applied notwithstanding the fact that the other joint owner was not a party of record in the suit in the State Court, but had full knowledge of the suit, was present at the hearing, was called for cross-examination by the licensed company as an adverse party and testified without objection.

So also in:

> *Gilchrist Co. v. Erie Specialty Co.*, 231 F 659; Certiorari denied, 242 U. S. 630; 37 S. Ct. 15; 61 L. Ed. 537,

where the subject matter of the suit before the Pennsylvania Court had been contested in a prior suit in New York, in which both parties to the Pennsylvania suit participated, the final decree in the prior action became res judicata.

It is submitted that in view of the principles exemplified in the above cases, there should not be the slightest difficulty in concluding that the questions now raised by Shick with reference to the fund in question, his claims and his judgments are res judicata several times over. So also, the questions now raised by Shick with respect to admissibility of evidence, use of the Federal record in the State Court and the jurisdiction of the Federal and State courts, being questions which either were or could have been adjudicated in the course of the prior proceedings, are res judicata.

This Court has already refused to review the main stream of proceedings, both in the Federal and State Courts. No reason is advanced at this time in support of his third application, which was not or could not have

been presented in one or the other of his prior petitions to this Court, so that there would seem to be nothing to move this Court to review this phase of the case at this time.

C. The Vacation of the Restraining Orders of March 14, 1927, Is a Matter within the Discretion of the District Court, Which Has Not Been Guilty of any Clear Abuse in the Exercise of that Discretion and Is a Matter Not Warranting Review by This Court.

This phase of the trustee's argument deals with the first part of the prayer of appellant's petition to the District Court and with the second question contained in the trustee's counter-statement of questions involved, as presented to the Circuit Court.

The restraining orders issued by the District Court on March 14, 1927, will be found at pages 56 and 57 of the Record. These orders restrained Shick from proceeding with the attachment executions begun by him in the Common Pleas Court on his two contested judgments. The jurisdiction of the District Court to make these orders in the first instance is res judicata for the reasons set forth in Part B of this argument. Shick has moved the District Court to vacate these orders on 6 separate occasions, in 1927, 1928, 1929, 1931, 1937 and 1940. On each occasion the District Court has seen fit to deny his petition. The trustee submitted to the Circuit Court that whether orders of this sort should be vacated is a matter which should be left to the sound discretion of the District Court, and that in the absence of any clear abuse of this discretion the action of the District Court should not be reversed.

Certainly prior to the setting aside of Shick's judgments by the Common Pleas Court these restraining orders

served a most necessary purpose in maintaining the status quo in the State Court and relieving the trustee from the burden of defending any execution proceedings upon these judgments, proceedings which would have been purely repetitious.

Shick argues that after the setting aside of his judgments there is no longer any reason for continuing the restraining orders in effect and that they should therefore be vacated. Why he should be so assiduous in seeking the revocation of these orders if their existence is as unnecessary as he contends, the trustee does not understand. Furthermore, Shick has not indicated how he is harmed in the slightest degree by the continued existence of these orders. The exact reason for Judge Dickinson's denial, on May 17, 1937, of Shick's petition to vacate does not appear from his three line opinion (R. 3a) in which he disposed of the matter, nor does the reason appear for Judge Kirkpatrick's similar action on November 6, 1940, and March 21, 1941. Judge Dickinson's only comment is that "the time comes when litigation should end" and Judge Kirkpatrick's opinion implies a similar feeling.

In view of the history of this case, the trustee does not have the slightest doubt but that Shick will resort to some further proceeding in the event that this present case is decided against him. What it will be, trustee of course cannot foretell. Trustee therefore pointed out to the Circuit Court the case of

United States v. Reading Co., et al., 300 F 477,

decided by the District Court of the United States for the Eastern District of Pennsylvania, the syllabus of which case states:

> "A decree of a District Court, entered pursuant to directions of the Supreme Court, determining the rights of common and preferred stockholders of a cor-

> poration to dividends, inter sese, in a suit in which both classes of stockholders were represented, rendered the matter res judicata, and where the court retained jurisdiction to make any further orders necessary in carrying the decree into effect, preferred stockholders will be enjoined from maintaining a suit in a state court which involves a redetermination by that court of the same question."

It is the trustee's belief that in the event of a decision in this case adverse to Shick, the Bankruptcy Court, which retains jurisdiction of the Albright bankruptcy proceedings in general, would be warranted in issuing a similar general restraining order against Shick to prevent him from any further attempts to relitigate any questions concerning the fund, his claims and his judgment. It is submitted, therefore, that the District Court may quite properly have considered these restraining orders as a partial restraining order of this general type, and that the action of the Circuit Court in affirming the District Court's refusal to vacate these orders was proper.

In any event, the propriety of the failure of the District Court to vacate orders which Shick himself says no longer have any effect, but which he has failed to show cause him any harm, does not seem to present a case where the discretion of the District Court should be disturbed or a question meriting the consideration of this Court.

D. The Facts of This Case Do Not Show that the Trustee Acted in Contempt of the Bankruptcy Court and the Question Does Not Justify Review by This Court.

This phase of the argument deals with the fourth part of the prayer of Shick's petition to the District Court and with the last of the questions as stated in the trustee's counter-statement of questions involved.

Argument

Shick's charge that the trustee in this case has been guilty of contempt seems to be directed at the trustee's prior counsel, rather than at the trustee himself, but such counsel are not parties to this action. The trustee was a layman, who was represented throughout by counsel, and who presumably acted only on the advice of counsel. At various stages of this proceeding Shick has referred to a remark attributed to the then counsel for trustee, which remark is alleged to have been: "I will do everything in my power to prevent the fund getting into your hands" (see letter from Shick to the Honorable J. Ambler Williams, dated March 4, 1932, R. 8a). In view of the remark by Judge Dickinson in his opinion of November 23, 1927, which Judge Kirkpatrick evidently thought appropriate to quote in his opinion filed November 6, 1940 (R. 34a), the remark being:

> "an opponent, however, would be excused to ascribe to him (Shick) a wish to complicate the case"

and in view of the history of the case prior to the writing of the letter to Judge Williams, it is suggested that trustee's then counsel might be excused for making such a remark. It is further suggested that the mere making of such a remark does not indicate the intention to employ any improper means to attain the desired end, and that the end itself was one which it was the duty of the trustee to attain in view of the prior decisions of the Bankruptcy Court.

The trustee has been charged with using piecemeal tactics, with oscillating between the State Court and the Bankruptcy Court, with improper use of the record of the Bankruptcy Court in the State Court, with concealment of material facts and with laches.

With respect to proceedings in the two courts, the facts show that the trustee began his contest of Shick's claim in the Bankruptcy Court only after Shick had made it necessary by presenting his claims; that the trustee went

into the State Court and became a party to the attachment executions only after Shick had reverted to the State Court and made it necessary for the trustee to follow him to preserve the status quo pending the determination of the claims which he had presented in the Bankruptcy Court; that the trustee secured his restraining orders of March 14, 1927, in the Bankruptcy Court only when it became apparent that he might be compelled to proceed in the State Court prior to a final order of the Bankruptcy Court allowing or disallowing Shick's claims and that the trustee went into the State Court to have Shick's judgments opened and set aside only after the Bankruptcy Court had disallowed the claims and the appeals from this disallowance had been concluded, and then only for the purpose of clearing the record in the State Court of these judgments in accordance with the decision of the Bankruptcy Court.

With respect to improper use of the Federal record and concealment of facts, it should be remembered that Shick actively participated in every single one of the various proceedings in the Bankruptcy and State Courts and that in each instance he had ample opportunity to point out to the court any such concealment or improper use of any record, and to have these questions passed upon immediately. If Shick feels that in any of these proceedings, the trustee did not disclose facts which should have been called to the attention of either of the courts, let it be remembered, first, that it was the trustee's counsel and not the trustee who determined what facts should be presented, and second, that Shick has not shown anything which would justify him in charging that the trustee's counsel, in the making of any factual presentation or submission of any court records, had any improper motive or acted otherwise than in accordance with their honest judgment.

A reading of the docket entries in the Bankruptcy Court (R. 1a, 2a, 51-54) and a reference to the facts recited with reference to the proceedings in the State Courts will

be a sufficient answer to any charge of laches or delay on the part of the trustee or his counsel.

This charge of contempt directed against the trustee is again but another attempt to raise indirectly issues long since dead and buried, but whose bones Shick will not let lie in peace.

E. Reference to Specific Points in the Petition for the Writ and in the Brief in Support Thereof.

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1. As to Part A "Summary and Short Statement of the Matter Involved" in the Petition for the Writ.

The trustee believes that all the matters set forth in this part of Shick's petition have been adequately met by the explanation of the facts and the argument hereinbefore contained, and that no present purpose would be served by any further extended reference thereto.

In passing, however, it might be well to point out that the escrow agreement did not specify who was to institute legal proceedings to test the validity of the judgments, and did not even necessarily require resort to legal proceedings if the matter could be settled amicably, so that the implication of obstructive tactics on the part of the debtor, contained in Shick's assertion that the debtor did not immediately institute proceedings to open the judgments but compelled Shick to bring the issue into Court by issuing attachments, is entirely unwarranted. Equally unwarranted is the implication of bad faith on the part of the debtor contained in Shick's assertion that the escrow agreement was secured upon a representation that no bankruptcy proceedings were contemplated, whereas voluntary bankruptcy proceedings were in fact instituted several weeks after this representation was made, in view of the fact that

these bankruptcy proceedings were begun only after Shick himself had issued his attachments upon the judgments, the validity of which was in question.

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2. As to Part B "Jurisdictional Statement" in the Petition for the Writ.

Shick's first reason in support of this Court's jurisdiction is allegedly based upon Section 237 (b) of the Judicial Code, 28 U. S. C. A. 344 (b). This section of the statute refers only to the review of the judgments or decrees of the highest court of a state, and does not apply to the review of judgments or decrees of a Circuit Court. Even by analogy to Section 237 (b), however, it is difficult to see how the pleading of the Federal decrees and orders in the State Court raises any Federal question. The use of these decrees and orders would seem to present a question of evidence under state law, and the effect to be given these Federal decrees and orders would again seem to be a question of state law, especially since no question of full faith and credit could arise in view of the fact that the Pennsylvania Courts did give full recognition to the Federal decrees and orders. In any event, it is a novel procedure to suggest that this Court, on review of an order of a Federal Court, should inquire into the propriety of proceedings in a State Court.

Shick's second ground for jurisdiction seems to be that the decision of the Circuit Court is in conflict with prior decisions of this Court, of the Circuit Court and other Circuit Courts and of the State Courts. It is submitted that the decision of the Circuit Court is the only possible decision consonant with the prior decisions of the various courts which have passed upon various phases of this case, and that, to the extent that prior decisions in this case are questioned, on the ground of conflict with general law, an attempt is being made to substitute this proceeding for

an appeal in those instances where no appeal had previously been taken and for a reargument in those cases where an appeal had been taken, neither of which objects are in accordance with our judicial system.

The references in Shick's third paragraph to questions of local law in conflict with applicable local decisions relative to (a) instruments under seal and pleas of want of consideration therefor, (b) the value or weight to be given to oral testimony, and (c) the use of a foreign record, if questions at all, are questions which have been or should have been determined in the previous streams of litigation culminating in the previous refusals of this Court to grant writs of certiorari. However, Shick has failed to point out anything to substantiate his assertion that any of these questions are involved.

Shick's fourth jurisdictional reason, namely, that the decision wholly disregarded the so-called "rule of comity" utterly disregards the fact that Shick himself submitted his rights upon the notes to the Bankruptcy Court, and that this question was the basic issue culminating in this Court's prior refusal of a Writ of Certiorari to the Circuit Court.

No special comment need be made with respect to the fifth and sixth paragraphs concerning the alleged confiscation of property and the alleged "sanction of the palpable miscarriage of justice."

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3. As to Part C "Questions Presented" in the Petition for the Writ.

The trustee's conception of the questions presented are adequately set forth in the trustee's Counter-Statement of the Questions Involved before the Circuit Court, which have been set forth earlier in this brief.

4. As to Part D "Reasons Relied on for Allowance of the Writ" in the Petition for the Writ.

Shick's reasons advanced in support of the allowance of the writ have already been adequately answered.

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5. As to the Brief in Support of the Petition.

(a) Priority of State Court's Jurisdiction

Whatever may have been the effect of the attachment executions issued by Shick prior to the institution of the bankruptcy proceedings, it was decided by the District Court, and affirmed by the Federal Court,

> *Shick v. Goodman,* 33 F (2d) 291; certiorari refused, 280 U. S. 561; 50 S. Ct. 19; 74 L. Ed. 616,

that Shick had elected to submit to the Bankruptcy Court the determination of the validity of his claims upon the judgment notes. As to opening and reversing the judgments themselves, it is undoubtedly true that the State Court alone could do this and that the mere decision by the Bankruptcy Court against the validity of the claims would not remove these judgments from the records. It was for this very reason that after the invalidity of the claims had been established, the trustee resorted to the State Court in 1932 to have the judgments opened.

(b) Propriety of Granting Restraining Orders

The reasons for the granting of the restraining orders of March 14, 1927, restraining Shick from proceeding with execution proceedings upon the judgments in the State Court have been fully and adequately stated before and should establish not only the propriety but the necessity for such orders. In any event, the restraining orders were issued in 1927, almost fifteen years ago, and no proceedings directly attacking their issue were taken by Shick, so that

it would seem rather late to raise this issue at the present time. It is true that Shick did attempt to have the orders vacated shortly after they were issued, but to the extent that his petition to vacate the orders is to be treated as an attack upon the granting of the orders themselves, the District Court ruled against him.

In re: Albright, 18 F (2d) 591

and he took no appeal.

(c) Propriety of Continuance of Restraining Orders

Shick has failed to substantiate in any manner his assertion that the continuance of the restraining orders of March 14, 1927, is oppressive, and he himself says in the heading to this part of his brief that their purpose has long since been moot. The propriety of the action of the lower courts in refusing to remove these orders is therefore hardly a question warranting the attention of this Court.

(d) Validity of Referee's Orders of September 28, 1926

All the matters raised under this division of Shick's brief relate solely to the action of the Referee in Bankruptcy on September 28, 1926, in disallowing Shick's claims and the affirmance of the Referee's disallowance by the District Court. The present proceedings are therefore an attempt to reopen the whole line of litigation, beginning with Shick's filing of his claims with the Bankruptcy Court and ending with the refusal of this Court to issue a Writ of Certiorari to review the disallowance of Shick's claims. It should be noted, however, in passing, that the Bankruptcy Court was not in a technical sense passing upon the validity of judgments entered in a Pennsylvania Court upon Shick's judgment notes, but upon claims presented by Shick upon the notes themselves, for which he recited the judgments as security. So also, it might be pointed out that the con-

test before the Referee was not on a plea of "want of consideration," but, to the extent that consideration was involved, on a question of failure of consideration. Finally, there was nothing in the escrow agreement to require the determination of the validity of Shick's judgments by a Pennsylvania Court or in accordance with any particular law or procedure.

(e) Contemptuous Conduct of Trustee Resulting in the Alleged Confiscation of Property Without Due Process of Law.

No additional comment need be made with respect to the fifth part of Shick's brief attempting to show that there was a confiscation of his property without due process of law by contemptuous procedure on the part of the trustee.

(f) Disregard of Equitable Maxims and the True Function of Courts

This section of Shick's argument requires no additional comment. Indeed, it is not at all clear what its purpose is, unless it is to indicate again the all too apparent desire of Shick to have this Court reopen and reconsider everything that has gone before from the time Shick filed his claims in the Bankruptcy Court.

(g) Necessity for the Exercise of This Court's Appellate Jurisdiction

This section of Shick's brief is subject to exactly the same comment made with respect to the immediately preceding portion thereof.

F. Conclusion

The trustee therefore respectfully submits that no reason has been shown justifying a request to this Court for a Writ of Certiorari in the present proceedings and that no reason has been advanced to move this Court to issue such a writ. The trustee therefore prays Your Honorable Court to dismiss the petition for Writ of Certiorari.

Charles H. Weidner, and with him
John H. Bertolet, both of
Stevens & Lee,
18 South Fifth Street,
Reading, Pennsylvania.
Attorneys for William A. Goodman, Trustee.

Dated: February 1, 1942.

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CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 853.

In the Matter of HARRY M. ALBRIGHT, Bankrupt.

ROBERT P. SHICK, Petitioner,

v.

WILLIAM A. GOODMAN, Trustee of HARRY M. ALBRIGHT, Bankrupt, Respondent.

Petitioner's Reply Brief Sur Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States.

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In the Matter of
HARRY M. ALBRIGHT, BANKRUPT.

ROBERT P. SHICK,
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v.

WILLIAM A. GOODMAN, TRUSTEE OF HARRY M. ALBRIGHT, BANKRUPT,
Respondent.

PETITIONER'S REPLY BRIEF.

Basic and fundamental errors in Respondent's Brief in answer to the petition for a certiorari and its supporting brief, necessitate a brief reply to its—

A. Statement of the Case, and

B. Argument.

A. Its statement of the case sedulously ignores or evades stubborn facts in the case:—

1. The escrow agreement of October 18, 1923 was necessitated by the debtor Albright's desire to give a good title to one parcel of his lands in Montgomery County, Pennsylvania, that were subject to *three* judgment liens held by petitioner. The subject matter of this agreement was these 3 judgment liens.

2. The requirements of the title company, that was asked to insure the grantee's title to this parcel of land, required the representation by debtor, as grantor, that he was *not* involved in or contemplated bankruptcy proceedings for himself.

3. To facilitate the financial settlement for such sale of debtor's parcel of land, petitioner agreed to escrow with the title company insuring the title to grantee, the net proceeds of this sale, pending the determination, "amicably or by appropriate legal proceedings", of the debtor Albright's objections to the validity of the *three* judgment liens.

4. The sale realized a fund, which was by this agreement escrowed, subject to the terms of this agreement, made by Pennsylvania citizens and subject to that State's laws for its construction and performance.

5. Efforts to settle "amicably" the dispute as to the validity of the three judgments failing, petitioner adopted the only "appropriate legal proceedings" open to him,— the use of attachment executions surjudgments, and these were served on November 7, 1923.

6. The debtor Albright had refused to adopt the well established course in Pennsylvania to carry out his obligation under this contract, i. e., the use of petitions to open the judgments and be let into a defense thereto. This would have resolved quickly the dispute as to the validity of the 3 liens, as in equity, upon bill and answer and depositions, if any evidence were required.

7. This debtor, however, elected to use the U. S. Bankruptcy Court to "hinder, delay and defraud" petitioner's

just claims upon these judgments, filed his petition there and secured an adjudication in voluntary bankruptcy on November 9, 1923.

8. In his schedules he listed petitioner's 3 judgments as "secured claims (claimed to be invalid)" and the Referee listed them on his Docket as "secured claims".

9. At the first meeting of creditors, the feud between the debtor and Walter G. Roland, legal plaintiff in the two judgments still unpaid showed itself (App. p. 4a), and petitioner, to give proper notice to the other creditors of debtor, as well as to protect his claim for any deficiency on his claims, in the event that the fund (in lieu of the parcel sold on October 18, 1923) and other lands of debtor, (the security for his claims) did not realize enough to pay the three judgments, filed *formal proofs* only of his three "secured claims", nothing more. He did not ask to participate in the meetings of creditors, by having this security appraised and his right to vote thereby determined, or otherwise. He did not "press" his claim, as respondent's brief on p. 6 asserts. He was present at the meetings of creditors only when Walter G. Roland (his assignor of the 2nd and 3rd judgments) was under cross-examination, as a witness subpœnaed under Section 21 A of the Bankruptcy Act, to be examined as to the "acts, conduct and property" of the bankrupt. He *defended* only, his claims against improper or illegal attempts to impeach his security—the three judgment liens.

10. Early in the prolonged hearings before him, the referee found that the bankrupt's testimony as to charge of forgery of the $3,000. judgment was palpably false and directed the trustee to request the escrowee to pay this $3,000.

judgment out of the escrowed fund—on December 24, 1924. The personal feud persisted, however, throughout the prolonged hearings, even showing its influence upon the referee's conclusions of fact, for his orders of September 28, 1926 (R. 285, 1937 pp. 15-6, Cf. App. p. 34a, line 17).

11. When the hearings before the Referee ended in March 1926 without any action by him directing the trustee to recover the escrowed fund, in a plenary proceeding, petitioner pursued his remedy in the State court, on the attachments.

12. On July 28, 1926, the respondent as trustee for the bankrupt, properly filed his petitions to the State court for leave to intervene as defendant in the two unpaid judgments and to present his defenses thereto. His petitions alleged, *inter alia*, the pendency of federal bankruptcy proceedings that would control any action by the State court. This, petitioner denied in a responsive answer.

13. On October 8, 1926 these petitions of respondent came on for a hearing before the Argument Court of 3 judges in the State court, but when called upon by that court to support by depositions his allegation as to a controlling federal proceeding, respondent's then counsel deliberately suppressed the fact that the bankruptcy referee had on September 28, 1926, filed findings that the judgment notes had been given without consideration and orders, that the claims thereon be "disallowed and expunged".

14. As a result of this deceit by trustee's counsel, the State court was constrained to find, on January 28, 1927, that it was the *proper forum* in which to test the validity of the judgments and directed the respondent to file within fifteen days his proper petitions to open the judgments,

etc., at the same time entering *stay orders* against further proceedings on the judgments.

15. These findings and orders the respondent made final, definitive and appealable by his acceptance of them in his petitions of February 11, 1927 for an extension of time to March 14, 1927 within which to file his petitions to open, etc., and by his taking no appeal therefrom to the Supreme Court of Pennsylvania. These orders of the State court (of January 28, 1927) thus became *res judicata* as of that date, and under the rule of comity was for the purposes of these two judgments, controlling and determinative of all subsequent proceedings in the Bankruptcy Court.

ON MARCH 14, 1927 RESPONDENT'S "PLAYING FAST AND LOOSE" WITH THE U. S. BANKRUPTCY COURT'S PROCESS BEGINS.

16. On this date, the last day for his compliance with the State court's orders of January 28, 1927, the respondent resorted to the Bankruptcy (U. S. D. C. E. D. of Pa.) and on his ex parte applications obtained the restraining orders despite petitioner's earnest request to the District Court judge for leave to file answers to respondent's petitions, thereby to test respondent's right to such restraining orders against further proceedings in the State court, on the attachments in execution on the judgment liens.

17. Petitioner's efforts to have judicially reviewed by the Bankruptcy Court the Referee's orders resulted in the irregular and ununderstandable orders of January 31, 1928, (so pronounced by the D. C. judge on November 6, 1940. Vid. R. 35a; for orders Vid. 28a, 29a), because of the legal conclusions of the reviewing judge *contra:*—

"the orders" (referee's of September 28, 1926, expunging petitioner's "secured claims") "are certainly not to be read as interference in any way with the record of the State court", in his opinion of November 10, 1927; "he" (petitioner) "may still assert his liens against the real estate and the funds in the hands of the garnishee and is *not concluded* by the findings of the referee", in his opinion of November 23, 1927, (vid. R. p. 15a [13]).

18. On appeal to the U. S. C. C. A. 3d C., that court concluded:—"We find no error in the court below (U. S. D. C.) enjoining him in so doing. Its decree is therefore affirmed." This obviously referred only to the restraining orders of March 14, 1927—not to the final orders of January 31, 1928, sustaining the referee's orders of September 28, 1926. Such final order but added another layer to the veritable tumulus of error then forming and now presented to this Court for an archaeological operation to discover the true factual situation at its base.

19. But the respondent successfully imposed upon the State court this order of the U. S. C. C. A. 3d. C. and this court's denial of a certiorari to review it upon the then record, to treat them as final, definitive orders, making the illegal and void orders of the referee (of September 28, 1926) *res judicata* of the invalidity of the judgment liens in the State court, *and*, despite its (State Court's) final orders of January 28, 1927, making the questions of the proper forum and its (Pennsylvania) procedure, *res judicata*, as of that date (to be in the State jurisdiction) to piecemealwise (a) on July 18, 1930, dissolve the attachments in execution; (b) on July 15, 1932, to vacate the stay orders of January 28, 1927; and finally (c) on January 17, 1936, to reverse the judgment liens and enter judgments

in favor of the respondent on the record of these judgments, entered on Septmber 14, 1923.

All these orders, undoing the State Court's own record upon these judgments, from their entry in 1923 up to January 28, 1927, were made upon the faith and credit of (but so wrongly given to) the apparent affirmance by the Bankruptcy Court, of the referee's orders of September 28, 1926 and their effect upon these judgments, self-confessed upon "judgment" notes under the bankrupt's seal and liens upon his real estate in Montgomery County, Pennsylvania. (For a graphic view of the basic errors in this cause, see pp. 10-11, of petitioner's brief (as appellant) in the U. S. C. C. A. 3rd C.).

20. Most amazingly, on September 9, 1930 (shortly after he had secured on July 18, 1930 dissolution of the attachments in the State court), respondent filed there his sworn answers, solemnly admitting that the service of these attachments on November 7, 1923, had drawn the escrowed fund into the possession of that State court, and had given it, as of that date, full and complete jurisdiction over the *res* (fund and judgments) and the parties, petitioner and Albright, later the bankrupt, (on November 9, 1923). Duplicitous is but a mild word, properly to characterize this action on the part of trustee and his then counsel.

21. In March 1940, respondent petitioned the State Court for an award to him of the fund in escrow, but was refused such an award for the reasons, (a) the dissolution of the attachments, on July 18, 1930, had removed the fund from its (State Court's) possession, and (b) his petition did not join the petitioner as a co-defendant with the escrowee.

Thus, by respondent's own acts the fund in escrow is now a *waif*, owner unknown, and liable possibly to an escheat. And the *purpose* of the contract of October 18, 1923, between petitioner and Albright and the title insurance company (escrowee), *completely frustrated*, all by respondent's most irregular (to characterize them mildly) acts, to the great loss of petitioner, by the confiscation of his security (of upwards of $30,000.) for his "secured" claims, *without due process of law.*

The above facts—(in paragraphs 16-20 *supra*) speak for themselves and call for a proper judicial characterization of such, the respondent's use of the process of the Bankruptcy Court to "hinder, delay and defraud" petitioner of his just claims against H. M. Albright, debtor-bankrupt here involved.

B. Respondent's Argument.

Petitioner accepts the law respondent has invoked and the authorities citied in his brief—as to the doctrine of *res judicata*, but urges that in his application of them, to the peculiar and unusual facts of this case, (involving, as it does, a conflict of jurisdiction with its basic rule of comity), he has not shown that "utmost good faith and fullest disclosure in one jurisdiction with reference to what are the exact facts in relevant litigation in a corresponding case in the other", enjoined upon "parties and counsel", by Taft C. J. in Harkin v. Brundage, 276 U. S. 36, 55. In view of his solemn admission of September 9, 1930 in the State court (as to the vesting first of the State court's jurisdiction) after he had on July 18, 1930 secured a dissolution of the attachments—the process by which it had vested on November 7, 1923, prior to the adjudication in

bankruptcy on November 9, 1923—respondent and his present counsel might well be accused of disingenuousness.

The use in piecemeal procedure of final orders of the U. S. Bankruptcy Court (so irregular and illegal, as shown above), which were secured by him in 1928, long after the debtor-bankrupt had contracted in the escrow agreement of October 18, 1923 (induced by his representation that no bankruptcy proceeding was contemplated by him)—to determine the validity of his objections to these judgments, entered in the State court on September 14, 1923, upon debtor's promissory notes (in Pennsylvania termed "judgment" notes) under his seal, with a "rider" or power of attorney in them, authorizing the holder to "confess" judgments thereon, in accordance with Pennsylvania law and procedure—and thus undo all that had been done to that end in the State court up to March 14, 1927, certainly was wholly lacking in candor and intellectual honesty.

It is to be noted that neither debtor nor his trustee (respondent) ever, at any time, questioned the authenticity, execution or delivery of the notes. The State court's jurisdiction *first* became fully vested over the *res* and the parties on November 7, 1923 and its complete jurisdiction was finally adjudicated by it (to be the proper forum in which to test the validity of the judgments) on January 28, 1927, *on respondent's own petitions* to that court. Respondent thus made the questions of the forum and proper procedure to that end *res judicata first* in the State Court on January 28, 1927 as against the orders of the U. S. Bankruptcy Court, of January 31, 1928, which respondent now urges as the *res judicata*, to control the final disposition of this whole litigation, so unduly protracted by respondent's misuse and abuse of the Bankruptcy Court's process. Of this

charge he must stand convicted, by his amazing solemn admission on September 9, 1930, that the State court's jurisdiction had become fully vested on November 7, 1923 when the service of its process drew into its possession the fund in escrow and likewise summoned the parties interested.

The fallacy and fundamental error in respondent's argument, are his complete disregard of the basic principle of priority in the rule of comity in the American system of dual courts of concurrent jurisdiction. Comity requires that the court's jurisdiction, which vests first, shall be respected to the end of the litigation. By respondent's acts the two courts (State and federal bankruptcy court) have been imposed upon and led into regrettable "competition and rivalry" in regard to assuming jurisdiction. (Harkin v. Brundage, supra.)

Further reply would seem unnecessary. Petitioner would respectfully refer to the "argument" in petitioner's brief, in support of his contention that on the facts and applicable law, he is entitled to a review of this case by this court, to the end that justice may be done to his rights and property claims, in "accord with the teachings of right, reason and conscience".

WHEREFORE, petitioner respectfully submits and earnestly urges that his prayer should be granted and a writ of certiorari allowed, directed to the United States Court of Appeals for the Third Circuit, to return to this court for review by your Honorable Court, the record of the proceedings in the Bankruptcy Cause No. 8578, in the District Court of the United States for the Eastern District of Pennsylvania.

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